

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR PETITIONER-APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,351

FILED

NOV 15 1956

Joseph W. Stewart

CLERK

FERRO-CO CORPORATION,

Petitioner-Appellant,

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE TAX COURT
OF THE UNITED STATES

RALPH F. BERLOW

Suite 637, Woodward Building
Washington 5, D. C.

Attorney for Petitioner-Appellant

Kenneth Carroad
40 Worth Street
New York 13, N. Y.

Theodore Propp
40 Worth Street
New York 13, N. Y.

On the Brief

(i)

No. 13, 351

**STATEMENT OF QUESTION PRESENTED
FOR PETITIONER-APPELLANT**

The question is whether The Tax Court of The United States was unjustified in dismissing the appellant's petition for lack of jurisdiction upon the basis of an alleged failure to make a timely substitution of the United States of America as respondent.

	<u>Page</u>
QUESTION PRESENTED	(i)
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES INVOLVED	5
STATEMENT OF POINTS	6
SUMMARY OF ARGUMENT	6
ARGUMENT	
Point I - Under the rationale of the California Eastern Line case, the doctrines of abatement and substitution do not apply to Tax Court proceedings, and may not be invoked to deprive the Tax Court of jurisdiction in this case	7
Point II - The United States of America entered an appearance and thereby substituted itself as respondent before the expiration of the four-year period for making substitution	10
Point III - On the argument of the respondent's motion on October 22, 1952, the petitioner-appellant showed to the Tax Court the necessity for the survival of the proceeding, within the four-year period specified by the Renegotiation of 1951, as amended	12
CONCLUSION	13

TABLE OF CASES

Chairman of the United States Maritime Commission v. California Eastern Line, Inc., 204 F.2d 398 (App. D.C. 1953)	6, 7, 8, 9, 10, 12
Trace v. War Contracts Price Adjustment Board, 21 T.C. 303 (1953)	9, 12, 13

STATUTES CITED

Sec. 1141 of the Internal Revenue Code of 1939	1
Sec. 7482 of the Internal Revenue Code of 1954	
26 U.S.C. Sec. 7482	1
Sec. 403(e)(1) of the Renegotiation Act of 1943	
50 U.S.C.A. App. Sec. 1191	1, 2
Renegotiation Act of 1951	
50 U.S.C.A. App. Sec. 1211 et seq.	2, 4, 6, 9, 10, 11

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,351

FERRO-CO CORPORATION,
Petitioner-Appellant,
v.
WAR CONTRACTS PRICE ADJUSTMENT BOARD,
Respondent-Appellee.

ON APPEAL FROM AN ORDER OF
THE TAX COURT OF THE UNITED STATES

BRIEF FOR PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

The petition in this case was filed in The Tax Court of the United States under the provisions of Sec. 403 (e) (1) of the Renegotiation Act of 1943 [50 U.S.C.A. App. Sec. 1191], which gives The Tax Court jurisdiction in renegotiation suits brought against the War Contracts Price Adjustment Board.

Sec. 1141 of the Internal Revenue Code of 1939 broadly vested Courts of Appeals with "exclusive jurisdiction to review the decisions of The Tax Court." This provision was perpetuated in Sec. 7482 of the Internal Revenue Code of 1954 [26 U.S.C. Sec. 7482]. The Courts of Appeals have power to review Tax Court renegotiation decisions on jurisdictional grounds, although they are without power to review The

Tax Court's determination of excessive profits. Inasmuch as the Tax Court's decision herein was based on jurisdictional grounds, the Court of Appeals for the District of Columbia has jurisdiction to review.

STATEMENT OF THE CASE

Appellant is a New York corporation. Under the provisions of the Renegotiation Act of 1943 [50 U.S.C.A. Sec. 1191], it filed a petition in The Tax Court of the United States for a redetermination of the determination of the War Contracts Price Adjustment Board [hereinafter sometimes called WCPAB] with respect to alleged excessive profits for the year 1944.

The original petition herein was filed July 22, 1946, (Rec. p. 3). Various answers and amended petitions were subsequently filed and issue was joined by the filing of an answer to the last amended petition on May 1, 1947 (Rec. p. 48). On October 2, 1950, the appellant's attorney addressed a letter (App. p. 6) to the Clerk of The Tax Court, inquiring when the case would be reached for trial. On October 5, 1950, the appellant's attorney received a reply from Victor S. Mersch, the Clerk of The Tax Court, advising "In renegotiation cases, we do not set the case for hearing in regular course until after the respondent advises us that they are prepared to try the case in accordance with the Court's Rule 31 (b)." (App. p. 6)

Effective May 22, 1951, while this action was pending before The Tax Court, the Renegotiation Act of 1951 was enacted into law [50 U.S.C.A. App. Sec. 1211 et seq.] pursuant to which the WCPAB was abolished and procedures were outlined to insure survival of pending court actions, [50 U.S.C.A. App. Sec. 1231]. The Act [50 U.S.C.A. App. Sec. 1231 (h)] provided that the abolition of the WCPAB would not be construed:

"to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a Party, on motion or supplemental petition filed at any time within four years after the effective date of this section, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States."

On October 3, 1952, a time when the WCPAB was no longer in existence, and the United States was the real party in interest which had in effect inherited the pending claims and lawsuits of the extinct WCPAB, Mr. Holmes Baldridge, the Assistant Attorney General, appearing generally, filed a motion with the Tax Court on behalf of the "respondent", asking that the petition be dismissed for failure to prosecute (App. p. 1). A memorandum in support of the motion was filed by Mr. Baldridge and oral argument on the motion was conducted at a hearing of The Tax Court on October 22, 1952 (App. pp. 2-8). Harold F. Leathers, Esq., representing the United States Department of Justice, entered an unqualified general appearance "on behalf of the respondent" (App. pp. 3-4). At the hearing on the "respondent's" motion (App. pp. 3-6), Mr. Leathers described to The Tax Court the difficulties encountered by the Department of Justice in securing stipulations of fact. Throughout the oral hearing, Mr. Leathers identified the Department of Justice as representing the "respondent."

Following Mr. Leather's oral argument, the appellant's counsel advised the Tax Court of the reasons for the delay in stipulations, told the Court of fruitless efforts that had been made by the petitioner to have the case scheduled for trial, and requested of the Court that "this

case be set for trial, notwithstanding any delay that might occur in the audit of stipulated facts." In response, the Judge directed, "the case will be set for trial in due course," and denied the "respondent's" motion to dismiss for failure to prosecute (App. pp. 5 to 8).

By September 16, 1955, almost three years had passed since the hearing on October 22, 1952, and the case had not yet been set for trial — a most extraordinary delay, particularly in view of the fact that the appellant's original petition had been filed on July 22, 1946. On September 16, 1955, the Department of Justice filed a motion with the Tax Court on behalf of the United States of America, "especially appearing for the purpose of this motion only," moving that the Court dismiss the proceedings for lack of jurisdiction by virtue of Section 201(h) of the Renegotiation Act of 1951, as amended (App. p. 9).

At the hearing on this motion held before The Tax Court on November 2, 1955, Harold F. Leathers of the Department of Justice once again appeared, as on the argument of the prior motion, but specifically stated that he was now appearing "for the United States, appearing especially for the purpose of this motion only" (App. p. 16). At the hearing, the appellant filed an answer to the respondent's motion to dismiss, and a cross-motion to substitute the United States as respondent nunc pro tunc, as of October 22, 1952, the date of the hearing in which the Department of Justice entered a general appearance on behalf of the United States to argue its unsuccessful motion to dismiss for failure to prosecute (App. p. 12).

The Tax Court, by an order dated November 15, 1955, granted the respondent's motion to dismiss for lack of jurisdiction and denied the appellant's cross-motion (App. p. 16). It is from this order that the instant appeal is taken.

STATUTES INVOLVED

Renegotiation Act of 1951, Sec. 201, as amended (50 U.S.C.A. App. Sec. 1231):

(a) The War Contracts Price Adjustment Board, created by the Renegotiation Act, is abolished.

* * * * *

(h) This section shall not be construed . . . (3) to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within four years after the effective date of this section, showing a necessity for the survival of such suit, action or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States . . .

* * * * *

(k) This section shall take effect sixty days after the date of the enactment of this Act. Mar. 23, 1951, c. 15, Title II, 65 Stat. 23.

STATEMENT OF POINTS

POINT I.

Under the rationale of the California Eastern Line case, the doctrines of abatement and substitution do not apply to Tax Court proceedings, and may not be invoked to deprive the Tax Court of jurisdiction in this case.

POINT II.

United States of America entered an appearance and thereby substituted itself as respondent before the expiration of the four-year period for making substitution.

POINT III.

On the argument of the respondent's motion on October 22, 1952, the petitioner-appellant showed to the Tax Court the necessity for the survival of the proceeding, within the four-year period specified by the Renegotiation Act of 1951, as amended.

SUMMARY OF ARGUMENT

Under the doctrine enunciated by this Court in the California Eastern Line case, the doctrines of abatement of substitution do not apply to Tax Court proceedings, since the Tax Court is not a judicial body but an administrative agency of the government. Furthermore, as the California Eastern Line case points out, it would be unjust to invoke such doctrines in a case such as this where United States has always been the real party in interest against whom this proceeding was brought.

Assuming arguendo that despite the California Eastern Line case, the doctrines of abatement and substitution may apply in this Tax Court proceeding, the United States Government voluntarily submitted itself

to the Tax Court's jurisdiction and substituted itself as the respondent, by entering an appearance and submitting a motion on behalf of the respondent at a time when the War Contracts Price Adjustment Board was no longer in existence. Also, the petitioner-appellant, at the time of the hearing on the aforesaid motion, demonstrated to the Court the necessity for the survival of this proceeding, which showing was timely and preserved the Tax Court's jurisdiction.

ARGUMENT

POINT I.

Under the rationale of the California Eastern Line case, the doctrines of abatement and substitution do not apply to Tax Court proceedings, and may not be invoked to deprive the Tax Court of jurisdiction in this case.

This Court has previously held that the technical rules of abatement and substitution are inapplicable in renegotiation proceedings before the Tax Court. Chairman of the United States Maritime Commission v. California Eastern Line, Inc., 204 F. 2d 398. That case involved a provision of the Renegotiation Act of 1949, substantially identical with the one here involved. Counsel for the respondent in that case argued that since the petitioner did not file a motion or supplemental petition with the Tax Court within the statutory deadline, requesting that the action survive against the successor to the governmental agency originally shown as respondent, the action abated and the Tax Court was deprived of jurisdiction. In denying the respondent's motion, the Court of Appeals decided that the term "court" as used in Section 9 of the Reorganization Act of 1949 was not meant to include the Tax Court. In addition to pointing out that the Tax Court was an administrative agency of the executive branch of the United States government rather than a judicial body, the Court of Appeals held

that the common-law rules of abatement did not apply to the Tax Court, stating at page 401 as follows:

"In renegotiation proceedings before the Tax Court, the doctrines of abatement and substitution applicable to judicial proceedings are not in our view required for the protection either of the citizen or of the Government. On the Government's side, it is the national treasury which, in any event, will ultimately gain or lose as against the citizen. And the hazard that the proper Government official may not be named as respondent under the rules of The Tax Court presents no serious difficulty. In the instant case, no affirmative relief was asked against the Chairman of the Maritime Commission in the Tax Court proceedings; the Tax Court was simply to review his order and redetermine the matters there involved. Abatement on the ground that the Chairman was no longer in office or his office no longer in existence would not bear any relation to the realities of the situation, and would defeat the ends of justice. We would not willingly reach that result unless required to do so by legislation or proper administrative rule. In the present case we find no such statutory or administrative requirement. Accordingly, we deny the Government's motion to remand the case to the Tax Court with directions to vacate its judgment."

It should be noted that in the California Eastern Line case, the Court of Appeals entertained the petition for review filed by the United States, although it had not previously been a party to the proceeding. The Court pointed out, at page 403 of the opinion:

"The United States, in its fiscal aspect, was the true opponent of the claims of the contractor before the administrative agency; it did not need to intervene in the proceeding before The Tax Court, for the governing statute had in substance placed it there."

It is the view of the petitioner-appellant that the decision in the California Line case is wholly persuasive and dispositive of the issues raised in this appeal. However, the respondent may perhaps argue that virtually identical statutory provisions may have widely contrasting

meanings because of differences in legislative history. See Trace v. War Contracts Price Adjustment Board, 21 T.C. 303. As the Trace decision points out, the statutory deadline embodied in the Renegotiation Act in 1951 was twice extended because of a Congressional fear that pending actions would be unjustly abated. This does not compel the conclusion that abatement would indeed have taken place. Congressional action to forestall unjust consequences which it feared might result from inaction does not bind this Court to the view that the Congressional action was a necessity rather than a precaution. In other words, the Court is not required to adopt the legal misconceptions of legislators as to the necessity of remedial legislation. In that connection, this Court has stated, with respect to the comparable statute involved in the California Eastern Line case:

"The statute's primary purpose was evidently to ameliorate the harsh consequences of the common-law abatement rules usually applicable to judicial proceedings. Any effect it has in causing termination of a 'suit, action or other proceeding' would appear to be secondary. Administrative proceedings, as far as we can discover, have never been held to be subject to the common-law rules of abatement. In principle they should not be, and a statute should not be interpreted as making them so subject unless the legislative intent clearly so requires. Changes in the personnel or organization of the executive branch should not be permitted, without good purpose, to delay or hinder the citizen in his dealings with any part of it."

The petitioner-appellant believes that the rationale of the California Eastern Line case applies fully to the issues in the instant case. But even if this Court should be inclined to withdraw from its view that the doctrines of abatement and substitution do not apply in Tax Court renegotiation proceedings, this would be a most inappropriate occasion for such an overruling. As will be shown in the subsequent points of this Argument, both the Tax Court and the United States had timely notice of the necessity for survival of the proceeding. Also, the United

States voluntarily effected a timely de facto substitution as respondent, and the delay in trial at the Tax Court level was not the fault of the petitioner-appellant. Under such circumstances, it would be unjust to deprive the petitioner-appellant of its day in Court on a \$50,000.00 renegotiation claim; the prior decision of this Court in the California Eastern Line case and the special circumstances involved in this case warrant the conclusion that the Tax Court did not lose jurisdiction over this proceeding.

POINT II.

The United States of America entered an appearance and thereby substituted itself as respondent before the expiration of the four-year period for making substitution.

Conceding arguendo that the Tax Court would be deprived of jurisdiction if a timely substitution of the United States as respondent had not been made, the proceedings before the Tax Court clearly indicate that the United States of America entered an appearance and thereby substituted itself as respondent within the four-year statutory deadline for effecting substitution.

On October 3, 1952, the War Contracts Price Adjustment Board had been abolished for over a year and its litigational rights and obligations had been inherited by the United States of America as the real party in interest. The statute which had extinguished the existence of the governmental agency had provided that pending proceedings might be maintained by or against the United States by a showing of necessity to continue the proceeding. The time limit for such a showing had not yet expired. 50 U.S.C.A. App. Sec. 1231 (h), as amended.

On October 3, 1952, there was pending in the Tax Court a renegotiation case brought by the petitioner-appellant, naming the "War Contracts Price Adjustment Board" as respondent, in accord with statutory requirements at the time the suit was filed.

On October 3, 1952, the Assistant Attorney General of the United States filed a motion with the Tax Court on behalf of the "respondent", asking that the appellant's petition be dismissed for failure to prosecute. On October 22, 1952 the motion was denied upon the basis of oral argument at which Mr. Leathers of the Department of Justice stated to the Court that he was appearing for the "respondent."

The question arises, who was the "respondent" represented by the Assistant Attorney General and the Department of Justice? And who was the "respondent" referred to throughout the oral argument on the motion? It manifestly could not have been the War Contracts Price Adjustment Board, for that agency had been abolished on May 22, 1951.

The identity of the "phantom respondent" is not difficult to determine. It could have been none other than the United States of America. This conclusion is made inevitable not only by the position of the Attorney General and the Department of Justice in the Executive Branch of our government, but by the express wording of the Renegotiation Act of 1951, which permitted the survival of pending proceedings by the substitution of the United States, the real party in interest, for the defunct Board.

United States thus submitted itself to the jurisdiction of the Tax Court, and exercised its prerogative to file a motion to dismiss for failure to prosecute which the petitioner-appellant was able to oppose successfully by oral argument. Can the United States now be permitted to deny that it was at that time a party to the proceeding? The petitioner-appellant respectfully urges that this Court recognize that the action taken by the authorized representatives of the United States effected its substitution as respondent, and that it may not now be permitted to raise technical objections to the method by which the substitution was accomplished.

It should be noted that the decision in Trace v. War Contracts Price Adjustment Board, 21 T.C. 306, assuming its correctness despite this Court's decision in the California Eastern Line case, does not apply to the facts of this case. There is no indication in the Trace case that the United States substituted itself as respondent before expiration of the alleged deadline, and hence the two situations are distinguishable.

POINT III.

On the argument of the respondent's motion on October 22, 1952, the petitioner-appellant showed to the Tax Court the necessity for the survival of the proceeding, within the four-year period specified by the Renegotiation of 1951, as amended.

At the argument of respondent's motion to dismiss for failure to prosecute, the attorney for the petitioner-appellant described to the Tax Court the frustration he had experienced in seeking to have the case set for trial on the merits. (App. pp. 6-8) He told the Tax Court of problems that had arisen with respect to stipulations, and related to the Court that the Clerk of the Tax Court had stated in writing that he would not set the case for trial until the respondent advised that it was prepared to try the case. He requested that the Court direct that the case be set for trial, and expressed his strong desire to have the proceeding tried on the merits as soon as possible. This request, which may be regarded as an oral motion, was granted by the Judge, who stated, "The case will be set for trial in due course..." (App. p. 8)

The petitioner-appellant respectfully urges that it clearly established the necessity for the survival of the suit at the hearing on October 22, 1952. Indeed, not only did the Tax Court deny the respondent's motion to dismiss, but the Judge directed that the case be set for trial in due course. Although it may appear that the Clerk

disregarded the Judge's direction that the case be set for trial, the conclusion is inevitable that the petitioner-appellant on October 22, 1952 convinced the Tax Court of the necessity for survival of its suit. Inasmuch as the alleged deadline for making such a showing did not expire until May 22, 1955, it was timely made. Assuming arguendo the correctness of the Trace case, upon which the respondent-appellee so heavily relies, it is nevertheless distinguishable from the case before this Court in that the petitioner-appellant herein demonstrated the necessity for survival of this proceeding well within the statutory deadline alleged by the appellee.

CONCLUSION

It is respectfully submitted that a careful consideration of the contested issues and the propositions of law involved require a reversal of the judgment below.

Respectfully submitted,
RALPH F. BERLOW,
Suite 637, Woodward Building
Washington 5, D.C.
Attorney for Petitioner-Appellant

KENNETH CARROAD
THEODORE PROPP,
On the Brief.

Dated November 13, 1956.

(i)

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Motion to Dismiss for Failure to Prosecute With Memorandum in Support Attached - Denied, filed October 3, 1952	55	1
Official Report of Proceedings Dated October 22, 1952	59	3
Motion to Dismiss for Lack of Jurisdiction With Memorandum in Support Attached Filed September 16, 1955	68	9
Answer to Respondent's Motion to Dismiss and Cross-Motion to Substitute United States as Respondent Nunc Pro Tunc	73	12
Excerpt from Official Report of Proceedings at Washington, D.C., November 2, 1955		16
Order Granting Respondent's Motion to Dismiss for Lack of Jurisdiction and Denying Peti- tioner's Cross-Motion to Substitute United States as Respondent Nunc Pro Tunc	79	16
Notice of Filing Petition for Review filed Feb. 15, 1956	85	17

THE TAX COURT OF THE UNITED STATES

[Denied Oct 22, 1952, J.W.Kern,
Judge, Tax Ct. of the U.S.]

SERVED Oct 29, 1952

[Filed Oct 3-1952, Tax Court
of the United States]

MEMORANDUM IN SUPPORT OF MOTION

The petition in the above entitled case was filed in July, 1946.

Thereafter, amendments to the petition were filed and the answer to the petition as amended was duly filed on May 1, 1947.

After various correspondence with petitioner's attorney of record, respondent's counsel by letter dated November 7, 1951, suggested that an attempt be made to stipulate in accordance with Rule 31 (b).

No response to the letter of November 7, 1951 has been received and so far as respondent's counsel has been advised, there has been no further activity in the case.

Accordingly, respondent respectfully moves that the foregoing motion be granted.

Respectfully submitted,

/s/ Holmes Baldridge

HOLMES BALDRIDGE
Assistant Attorney General

/s/ Harland F. Leathers
HARLAND F. LEATHERS
Attorney

57 [Filed Oct 30, 1952, Tax Ct. of the U.S.]
OFFICIAL REPORT OF PROCEEDINGS
BEFORE
THE TAX COURT OF THE UNITED STATES

* * * * *

58 Court Room No. 1,
Tax Court of the United States,
Washington, D. C.,
Wednesday, October 22, 1952.

MOTIONS

(Met, pursuant to notice, at 10:30 o'clock, a.m.)

BEFORE:

HON. JOHN W. KERN, Judge.

APPEARANCES:

THEODORE PROPP, Esq., 40 Worth Street,
New York 13, N.Y.
appearing on behalf of the
Petitioner.

HAROLD F. LEATHERS, Esq., Room 3409, Department of
Justice,
appearing on behalf of the
Respondent.

- - - -

59 **PROCEEDINGS**

THE CLERK: Docket 550-R, Ferro-Co Corporation vs. War Contracts Price Adjustment Board.

THE COURT: Will counsel state their appearances.

MR. LEATHERS: Harold F. Leathers, for Respondent.

MR. PROPP: Theodore Propp, for the Petitioner.

MR. LEATHERS: May it please the Court, in the case this morning, I understand there is a motion to dismiss for failure to prosecute. As stated in our memorandum, we addressed a letter to Respondent's counsel on November 7, 1951, to which no response was made. Petitioner is represented by counsel here this morning, and has a memorandum which he has given me a copy of. I haven't had a chance to examine it, but it indicates that they are anxious to go to trial. Under the

circumstances, of course, we have no objection to denial of the motion, and are ready to consider it.

THE COURT: Has an order been made?

MR. LEATHERS: No, sir. I wanted to explain that situation to the Court, so that we could see if there is agreement now. There was considerable correspondence by the attorneys in the Department of Justice prior to my being assigned to the case. The Petitioner had several conditions to the audit, which were unsatisfactory, and still are, the chief one being that we agree to submit a full copy of the report, which of course we cannot do. However, the last letter that he wrote, dated
60 November 7, 1951, I would like to read; it is very short, and it will show the position that we are in; and, I think, the proper solution.

This is a letter addressed to Mr. Carroad, counsel for the Ferro-Co Corporation.

"Examination of our files indicates that the above-entitled case is on appeal in the Tax Court, in which stipulations are now being prepared in accordance with Tax Court Rule 31 (b).

"Under the circumstances, we suggest that you may wish to prepare and submit to us a draft of the stipulation. We shall then be in a position to discuss specifically with you the procedure to be followed in verifying the material which you may wish to stipulate."

That is signed by an Assistant Attorney General.

THE COURT: Well, Mr. Leathers, wouldn't there be some letters which the Petitioner would not be particularly interested in stipulating, yet which ought to be stipulated from the standpoint of the Court in the trial of the case?

MR. LEATHERS: Yes, of course; but until we know — it is the Petitioner's case, and I understand they have certain evidence, including the stipulation, and one they indicate what they wish to stipulate, it seems to me we will then be in a position to discuss how to verify that statement of facts, and also suggest a statement of facts.

61 THE COURT: In other words, the stipulation of facts not only applies to Petitioner's facts, but applies to what the facts are upon which the Respondent relies, because the purpose of the stipulation is to assist the Court in the expeditious trial of the case.

MR. LEATHERS: That, of course, is true; but what the Respondent produces in the way of evidence depends upon what the Petitioner produces first, because, after all, it is his burden; and when he indicates what he wants to stipulate, then we can make a filing of what we want to show to meet his facts.

THE COURT: Then you will confine the audit to the matters which the Petitioner wants to prove, and also the matters which the Respondent wants to prove, in the light of the facts as set out.

MR. LEATHERS: There is some way that this impasse has got to be lifted, and it seems to me that the first way is for one party — it seems to me clear the Petitioner — to suggest what he wants to stipulate as to what are the facts.

THE COURT: Then you will make suggestions.

MR. LEATHERS: Then, of course, we will counter-suggest, in view of what he says. If he doesn't want to stipulate the facts, of course, neither do we.

62 THE COURT: The paramount desideratum in this matter is the convenience of the Court in the expeditious handling of the case.

MR. LEATHERS: Of course.

THE COURT: Counsel for both parties may set up and preside over an auditor's job rather than the trial of the case, regardless of the wishes of counsel.

MR. LEATHERS: Your Honor must be aware that we have had lots of these cases, and we are anxious to stipulate, because we don't have too much time.

THE COURT: I am talking for the benefit of both counsel. The Court is interested in the stipulation. The method that you suggest sounds reasonable to me; but the Court is not so much interested in the method as in the net result. What we want is to have the facts stipulated

in the case, and we don't want to preside over a long auditor's job.

Let me hear from the Petitioner on that. You are not Mr. Carroad?

MR. PROPP: I am an attorney from Mr. Carroad's firm. I have entered an appearance in this case.

Your Honor, the record of correspondence in this case, I believe, which is contained in the summary, this answer which I would like to hand to the Court at this time, I believe shows that the Petitioner has repeatedly sought to get this case set for trial, to have audits made; but the conditions that the petitioning attorneys have always regarded
63 as essential to the protection of the Petitioner's interests in the case — incidentally, speaking of expedition, as far as back as 1947, we wrote a letter to the then Assistant Attorney General, setting forth the conditions which we deemed essential for the audit, and for more than three years that letter was not answered. There was no reply from the Government.

On October 2, 1950, we addressed a letter to Mr. Mersch, asking what status the case had on the calendar. He replied — and I quote from his letter of October 5, 1950:

"In renegotiation cases we do not set the case for hearing until after the respondent advises us that they are prepared to try the case in the court in accordance with Court Rule 31(b)."

On December 5, 1950, we wrote to the Attorney General a short letter that I would like to read in full:

"Dear Sir:

"I am anxious to set a date for trial of the pending case, Ferro-Co Corporation, Docket 550-R, in which I am the attorney for the petitioner. This case has been awaiting trial for several years, and I am anxious to have it presented to the Tax Court in the spring of 1951.

"Please let me know what is causing the delay, and what steps might be taken to expedite trial of the case."

The reply to that letter was a letter from the Respondent, saying
64 they could not give us a report of the FBI audit.

In reply to that, we wrote a letter stating that we wanted the case to go to trial, stating in our letter of January 9, 1951:

"Rather than delay the trial of the case any further, we request a trial date be set for this spring, or as soon thereafter as possible. Meanwhile, the Department of Justice is welcome to audit Petitioner's books, subject, however, to the limitations set forth in Petitioner's letter of consent dated January 10, 1947.

"We stand ready to cooperate with your office, with a view to entering into stipulations of all relevant facts upon which a decision can be reached."

The reply to that letter was a repetition of the prohibition on the Government in acceding to our conditions that were set forth in 1947.

We wrote again to the Government, setting forth the justification for our conditions, on February 8, 1951,

We received the same reply back, —they could not agree to our conditions.

Then, in 1951, in the letter to which Respondent's attorney referred, and which he just read, he wrote to us, nowhere stating that the Government's restrictions on the giving of the auditor's report were removed, asking us to submit to him what is, in effect, our case in
 65 writing, and then he will be in a position to say, "Sorry, we can't audit these figures under your terms. We will have to go to trial." We want to go to trial in this case, and we believe our restrictions are reasonable.

I have a quotation which Your Honor, from my letter of February 8, 1951, which I will not bother to read now; it appears, starting on page 3 of the memorandum—which sets forth in some detail the reasons why we think our conditions on the FBI audit are reasonable for the protection of our client. We want to try it as quickly as possible, but we don't want the Government to go over a voluminous set of books, to be able to pick out individual transactions, and then befuddle and confuse our witnesses on cross-examination. We want to know what they found and what their case is — the same way that we want to give them our case

on the record.

Of course, I heard Respondent's agreement to have his motion dismissed. I would like to further state that he did not write to us before making this motion, or communicate with us; and I might suggest that it is somewhat of an imposition upon court procedure to proceed in this manner, by a motion to dismiss, failure to prosecute, when the entire record shows that we wanted to go to trial on this case.

THE COURT: You heard the proposal made by Mr. Leathers just a moment ago, with regard to your submitting the facts which you think
66 can be stipulated and should be stipulated, and then Mr. Leathers will submit to you the general subject upon which he would want to enlarge the stipulation, and then have the audit confined to the matters set out in your proposed stipulation and the subjects covered in the proposal made by the Government as to the enlargement of the stipulation.

MR. PROPP: That has always been agreeable to us, sir.

May I further make a request that this case be set for trial, notwithstanding any delay that might occur in the audit of stipulated facts?

THE COURT: The case will be set for trial in due course, but if the audit is not completed, and the stipulations are not yet ready, I would have to suggest that the case be continued, because this Court is not going to sit over an auditing job in the trial of the case.

MR. PROPP: It is my understanding — and Mr. Carroad intends to try this case — it will not involve presentation of audit figures at the trial. I believe he intends to rely upon tax returns which have been audited by the Government already, and that the trial of this case will not be cumbersome or inconvenient to the Court.

THE COURT: I understand that the proposal made by Mr. Leathers is satisfactory to the Petitioner, and that you will proceed with as much
67 speed as possible; that counsel will cooperate in the preparation of the stipulation. And, on that assumption, this case will be set for trial in due course. The motion to dismiss will be denied.

68 [Filed Sep 16, 1955, Tax Ct. of U.S.]

MOTION TO DISMISS

Comes now the United States of America, especially appearing for the purpose of this motion only, and moves the Court to dismiss the proceedings filed herein for lack of jurisdiction in accordance with the provisions of Section 201 (h) of the Renegotiation Act of 1951, as amended.

Respectfully submitted,

/s/ Warren E. Burger
Assistant Attorney General

/s/ Edward H. Hickey
Attorney, Department of
Justice

H. F. Leathers (Stamped)
HARLAND F. LEATHERS
Attorney, Department of Justice

69 MEMORANDUM IN SUPPORT OF MOTION

A unilateral order was duly issued by the War Contracts Price Adjustment Board and mailed to the petitioner in the above entitled case pursuant to the terms of the Renegotiation Act. By this order it was determined that petitioner had realized excessive profits in the amount of \$50,000 for the fiscal period ended December 31, 1944. Thereafter, a petition in the above entitled case was filed in the Tax Court on July 22, 1946.

The authority by which petitioner filed the petition, and under which this Court had jurisdiction of the matter, was Section 403 (e) (1) of the Renegotiation Act of 1943 (50 U.S.C.A. App. Sec. 1191), which provides in pertinent part:

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within

70

ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.

The War Contracts Price Adjustment Board was named as the respondent in this action.

After the filing of the petition, and while this action was still pending in this Court, Congress enacted the Renegotiation Act of 1951 (50 U.S.C.A. App. Sec. 1211 et seq.). The Renegotiation Act of 1951 was approved on March 23, 1951, and pursuant to Section 201(k) was effective sixty (60) days thereafter, or on May 22, 1951 (50 U.S.C.A. App. Sec. 1231 (k)).

By the provisions of the Renegotiation Act of 1951 (Sec. 201 (a)) the War Contracts Price Adjustment Board was abolished (50 U.S.C.A. App. Sec. 1231 (a)). However, the statute provided that no action should abate, but that any court which had on its docket a case to which the War Contracts Price Adjustment Board was a party may allow the action to be maintained against the United States if a supplemental petition or motion showing necessity for its survival was filed within twelve (12) months from the effective date of the statute. Section 201(h) of the Renegotiation Act of 1951 (50 U.S.C.A. App. Sec. 1231 (h)) provides in pertinent part as follows:

71 This section shall not be construed * * * to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States.

By a supplemental statute (66 Stat. 753) the time for filing a supplemental petition or motion was extended for an additional twelve months, or to May 22, 1953.

In 1954, again by supplemental statute (68 Stat. 1118), the time for filing a supplemental petition or motion was once more extended, this time for an additional two years, or to May 22, 1955.

No motion or supplemental petition seeking to show the necessity for the survival of this case has been filed in this Court within the statutory period as set forth above.

The result of the failure to take the action required by statute (namely, the filing of the motion or supplemental petition within the time prescribed), it is submitted, is the loss of jurisdiction by this Court to continue with this action.

It has been so held by this Court. See Trace v. War Contracts Price Adjustment Board, 21 T.C. 303 (1953).

Under the circumstances, it is submitted, the Court lost jurisdiction upon the running of the statutory period, no motion or supplemental petition having been filed.

72 WHEREFORE, The motion to dismiss should be granted.

Respectfully submitted,

/s/ Warren E. Burger,
Assistant Attorney General

/s/ Edward H. Hickey
Attorney, Department of Justice

H. F. Leathers (Stamped)
Harland F. Leathers
Attorney, Department of Justice

73

[Filed at Hearing at Washington, D. C. , Nov. 2-1955,
Tax Ct. of the U.S.]

ANSWER TO RESPONDENT'S MOTION TO DISMISS
and
CROSS-MOTION TO SUBSTITUTE UNITED STATES AS
RESPONDENT NUNC PRO TUNC

COMES NOW the Petitioner, by its attorney, KENNETH CAR-ROAD, and makes and files the following answer to the motion of the United States of America to dismiss the proceedings herein for lack of jurisdiction, and makes and files the following cross-motion to substitute the United States of America as respondent nunc pro tunc as of October 22, 1952, and as the basis for this answer and cross-motion, states the following:

1. A motion has been made by the United States of America, asking the Court to dismiss the proceeding upon the ground that the petitioner's action has abated because of an alleged failure to comply with Section 201 (h) of the Renegotiation Act of 1951 (50 U.S.C.A. App. Section 1231 (h)), as amended by 66 Stat. 753 and 68 Stat. 1118, relating to procedures necessary to insure survival of pending court actions against the War Contracts Price Adjustment Board.

74

2. The motion to dismiss should be denied for any one of a number of reasons which are hereinafter set forth. In the first place, it should be noted that 50 U.S.C.A. App. Section 1231 (h) was amended on September 1, 1954 to provide:

" . . . any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within four years after the effective date of this section, showing a necessity for the survival of such suit, action or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States. "

It appears on the face of the statute that the United States may be substituted as respondent at any time until August 31, 1958, which is four years after the effective date of Section 1231 (h) as amended. Although

it may be argued from legislative history that Congress may have intended to extend the time for substitution only until May 22, 1955 (four years from the effective date of Section 1231(h) as originally enacted), the plain wording of the statute prohibits any such non-literal construction. Moreover, even if the statute is regarded as ambiguous in this respect, the very obvious injustice that would result from abatement of the actions compels an interpretation favoring the petitioner.

3. The Court's attention is respectfully directed to a motion to dismiss for failure to prosecute made by the respondent on October 3, 1952. That motion, which was denied by The Tax Court, was made at a time when the War Contracts Price Adjustment Board was no longer in existence, having been abolished by the Renegotiation Act of 1951. The motion papers were signed by Mr. Holmes Baldridge, the then Assistant Attorney General, and the motion was argued on behalf of

75 "the Respondent" by Mr. Harland F. Leathers, an attorney in the United States Department of Justice. It is submitted that the United States, by making the motion of October 3, 1952, entered a general appearance in the case and substituted itself de facto as respondent, in the place and stead of the War Contracts Price Adjustment Board.

It should be noted that the present motion to dismiss is made by the United States of America "especially appearing for the purpose of this motion only," whereas the earlier de facto appearance by the United States of America in the 1952 motion was in no way qualified or restricted to a special appearance. The United States having entered a general appearance "on behalf of the Respondent" in 1952, and The Tax Court having recognized the appearance by entertaining a motion to dismiss, the United States should not now be permitted to deny that it has become substituted for the War Contracts Price Adjustment Board. There is no requirement that the motion for substitution be made by the petitioner; indeed, the motion, implying substitution (for otherwise, the motion to dismiss could never have been made or entertained), was made by the United States. And the "necessity for survival of such suit" was set forth in great detail in the petitioner's answering memorandum, expanded

at the oral hearing, and acknowledged by Mr. Leathers in open court.

The failure of the Court to order a substitution of the United States of America as respondent was a mere failure to direct a ministerial act giving effect to what was implicitly determined by the Court when

76 it accepted a general appearance by the United States of America and entertained a motion made by it. In such a case a court has authority to direct that an entry be made on the court's records nunc pro tunc as of the earlier date when the entry should have been made. This is not a power based on equity jurisdiction but derives solely from a court's inherent jurisdiction to "set the record straight."

It should be noted that the United States of America has always been the real party in interest in this proceeding, since the War Contracts Price Adjustment Board was a governmental agency. The requirements of Section 201 (h) were motivated by a desire to notify the United States of pending actions, so as to avoid surprise if a substitution were made at the last moment. It is submitted that the history of this proceeding amply shows that the United States acknowledged that it is the real party in interest and undertook to act in protection of its interests long before the alleged deadline for substitution. It would be a perversion of Congressional intent if the clerical formalities of substitution were considered more vital as a source of the Court's continuing jurisdiction than the actuality of substitution by acts and deeds which admit of no other implication.

4. The petitioner is not unaware of the decision in the Trace v. War Contracts Price Adjustment Board, 21 T.C. 303 (1953), relied upon by the United States as a binding precedent for the dismissal of this action. That decision makes it clear that The Tax Court will regard itself as a "court" in construing Section 201 (h) of the Renegotiation Act of 1951, despite the decision of the Court of Appeals for the District of Columbia

77 Circuit in Chairman of United States Maritime Commission v. California Eastern Line, Inc., 204 F. 2d 398. However, the petitioner in the Trace case appears to have placed full reliance upon the statutory construction of the word "court," and did not present for the Tax Court's

consideration the grounds which are urged herein. Accordingly, the Trace case cannot be regarded as determinative of the issues herein raised.

5. The attention of the Court is respectfully directed to the decision by Judge Murdock in Grant d/b/a Grant Tool Supply Co. v. War Contracts Price Adjustment Board, 3 CCF 550 (Docket No. 136R, April 20, 1945). In that case, the respondent moved to dismiss upon the ground that the Secretary of the Navy should have been named as respondent. In denying this motion, and granting petitioner's motion to substitute the proper party respondent, the Court said, "The correction of this error is not the commencement of a new proceeding, therefore, cases which hold that a new party defendant cannot be substituted in other types of proceedings after the statute of limitations has run are not in point."

6. In conclusion, the petitioner wishes to note that the amount in controversy is the very substantial sum of \$45,400.00, and that the petitioner firmly believes in the merit of its case. It would be a frustration of justice if the petitioner were deprived of its day in Court, particularly in view of the fact that the United States has in no way been prejudiced by any inaction of the petitioner, but has (before the alleged "deadline" for substitution) acknowledged that it is the real party in interest, entered a general appearance, and defended the case as its own.

78 WHEREFORE, good and sufficient cause having been shown, it is respectfully prayed that the motion to dismiss be denied and that the United States of America be substituted as the party respondent herein.
Dated: October 31, 1955.

Respectfully submitted,

THEODORE PROPP

Attorney for Petitioner
#40 Worth Street
New York 13, N.Y.

EXCERPT FROM OFFICIAL REPORT OF PROCEEDINGS

at Washington, D. C., November 2, 1955

PROCEEDINGS

The Clerk: Docket No. 550R, Ferro-Co Corporation. State your appearances for the record, please.

Mr. Leathers: H. F. Leathers for the United States, appearing especially for purpose of this motion only.

* * * * *

79 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION AND DENYING PETITION-
ER'S CROSS-MOTION TO SUBSTITUTE UNITED STATES
AS RESPONDENT NUNC PRO TUNC

The respondent filed a motion, on September 16, 1955, to dismiss this proceeding for lack of jurisdiction in accordance with the provisions of section 201 (h) of the Renegotiation Act of 1951, as amended. The petitioner filed a cross-motion on November 2, 1955, to substitute the United States as respondent nunc pro tunc as of October 22, 1952. The motions were argued on November 2, 1955.

The petitioner filed a petition with this Court pursuant to the provisions of section 403 (e) (1) of the Renegotiation Act of 1943 on July 22, 1946. Congress enacted the Renegotiation Act of 1951 while the matters raised by this petition were still pending in this Court. That Act abolished the War Contracts Price Adjustment Board and provided in section 201
80 (h) of that Act that the United States might be substituted as respondent for the War Contracts Price Adjustment Board upon motion or supplemental petition filed in this Court within 12 months of the effective date thereof, or to May 22, 1952. Supplemental statutes extended the time for filing a motion or supplemental petition for the substitution of parties an additional three years, or to May 22, 1955. This petitioner

has failed to file the required supplemental petition or a motion. The provisions of section 201(h) of the Renegotiation Act of 1951 were not complied with by the petitioner within the time fixed by Congress, and this Court is without jurisdiction to consider the matters raised by the petition. C. H. Trace v. War Contracts Price Adjustment Board, 21 T.C. 303. Therefore, the respondent's motion to dismiss for lack of jurisdiction is granted, and the petitioner's cross-motion to substitute United States as respondent nunc pro tunc is denied.

(Signed) J. E. MURDOCK
Judge

Dated - Washington, D. C.
November 15, 1955.

85

[Filed Feb. 15, 1956, The Tax
Court of the United States]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FERRO-CO CORPORATION,	)	
<u>Petitioner on Review,</u>	)	
v.	)	Docket No. 550-R.
WAR CONTRACTS PRICE ADJUSTMENT	)	
BOARD,	)	
<u>Respondent on Review.</u>	)	

NOTICE OF FILING PETITION FOR REVIEW

TO: Warren E. Burger,
Assistant Attorney General,
Department of Justice.

You are hereby notified that Ferro-Co Corporation did, on the 15th day of February, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C. , a petition for review by the United States Court of Appeals for the District of Columbia Circuit, of the

decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 15th day of February, 1956.

(Signed) Howard P. Locke

Howard P. Locke, Clerk

The Tax Court of the United States.

Service of copy of Petition for Review
acknowledged this 15th day of February,
1956.

(Signed) Warren E. Burger

Assistant Attorney General
Department of Justice
Attorney for Respondent.

BRIEF FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13351

FERRO-Co CORPORATION, PETITIONER

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE TAX COURT OF
THE UNITED STATES

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER,
JOHN G. LAUGHLIN,

*Attorneys,
Department of Justice, Washington 25, D. C.,
Attorneys for Respondent.*

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 27 1956

Joseph W. Stewart
CLERK

COUNTER-STATEMENT OF QUESTION PRESENTED

By section 201 (a) of the Renegotiation Act of 1951, Congress abolished the War Contracts Price Adjustment Board and by section 201 (h) of that Act, as amended, allowed four years within which the United States, upon motion or supplemental petition, could be substituted for the WCPAB in renegotiation cases pending before "any court". The question presented is whether the Tax Court is a "court" as used in section 201 (h) so that upon petitioner's failure to file a timely motion or supplemental petition in the Tax Court showing the necessity for the survival against the United States of its petition for a redetermination of excessive profits, the Tax Court properly dismissed the petition for lack of jurisdiction.

(I)

THE HISTORY OF THE UNITED STATES

THE HISTORY OF THE UNITED STATES
FROM THE FIRST SETTLEMENTS
TO THE PRESENT TIME
BY
JAMES M. SMITH
NEW YORK: PUBLISHED BY
J. B. LIPPINCOTT & CO.
1854.

THE HISTORY OF THE UNITED STATES
FROM THE FIRST SETTLEMENTS
TO THE PRESENT TIME
BY
JAMES M. SMITH
NEW YORK: PUBLISHED BY
J. B. LIPPINCOTT & CO.
1854.

INDEX

	Page
Counter-statement of question presented.....	i
Counter-statement of the case.....	1
Statutes involved.....	3
Summary of argument.....	4
Argument.....	5
I. The Tax Court correctly dismissed the petition because of petitioner's failure to comply with the requirements of section 201 (h) of the Renegotiation Act of 1951.....	5 5
Introduction.....	
A. The requirements of section 201 (h) apply to pro- ceedings for redetermination of excessive profits in the Tax Court.....	6
B. The legislative history of section 201 (h), as amended, confirms that the survival require- ments of section 201 (h) apply to redetermina- tion proceedings in the Tax Court.....	8
II. Petitioner failed to file timely a motion or supplemental peti- tion showing the necessity for the survival of the Tax Court proceeding for redetermination.....	11
Conclusion.....	12
Appendix A.....	13
Appendix B.....	20

CITATIONS

Cases:

<i>Chairman of U. S. Maritime Commission v. California Eastern Line</i> , 92 App. D. C. 207, 204 F. 2d 398.....	3, 5, 6
<i>C. H. Trace v. War Contracts Price Adjustment Board</i> , 21 T. C. 303.....	2, 3, 7, 10
<i>Defense Supplies Corp. v. Lawrence Warehouse Co.</i> , 336 U. S. 631.....	6, 8, 12
<i>Gaynor v. Metals Reserve Co.</i> , 174 F. 2d 286 (C. A. 8), certiorari denied, 338 U. S. 909.....	6
<i>Snyder v. Buck</i> , 340 U. S. 15.....	6
<i>United States v. California Eastern Line</i> , 93 App. D. C. 289, 211 F. 2d 635, reversed, 348 U. S. 351, on remand, — App. D. C. —, 231 F. 2d 754, certiorari denied, 352 U. S. 848.....	5, 7

Statutes:

Public Law 576, 82d Cong., 2d Sess., approved July 17, 1952, 66 Stat. 752-753, sec. 3.....	2, 4, 8
Public Law 764, 83d Cong., 2d Sess., approved September 1, 1954, 68 Stat. 1116, 1118, sec. 8.....	2, 4
Renegotiation Act of 1943, sec. 403 (e) (1), 50 U. S. C. App. 1191 (e) (1).....	7

IV

Statutes—Continued

	Page
Renegotiation Act of 1951, 65 Stat. 7, 23-24, as amended, 50 U. S. C. App. 1231 (a):	
Sec. 201.....	3
Sec 201 (a) (50 U. S. C. App. 1231 (a)).....	1, 1, 4, 6
Sec. 201 (h) (50 U. S. C. App. 1231 (h)).....	1,
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12	
Renegotiation Amendments Act of 1956, 70 Stat. 786.....	11
Reorganization Act of 1949, 63 Stat. 206, sec. 9, 5 U. S. C. 133z-7 (b).....	3, 5, 6
Miscellaneous:	
98 Cong. Rec. 9079.....	9
98 Cong. Rec. 9449.....	9
99 Cong. Rec. 9523.....	9
99 Cong. Rec. 10537.....	10
100 Cong. Rec. 14771.....	10
100 Cong. Rec. 14772.....	10
100 Cong. Rec. 14776.....	10
100 Cong. Rec. 15215.....	11
100 Cong. Rec. 15216.....	11
Hearings before the Committee on Ways and Means on H. R. 9246, House of Representatives, 81st Cong., 2d Sess., pp. 244-245.....	7
H. R. 1724.....	7, 8
H. R. 5734.....	8, 9
H. R. 6287.....	9, 10, 11
H. R. 9246.....	7
H. Rept. No. 7, 82d Cong., 1st Sess., pp. 1, 14.....	7, 8
Rules of Practice before the Tax Court of the United States, 26 U. S. C. A., following 7453. Rule 64.....	7
S. Rept. No. 92, 82d Cong., 1st Sess., p. 22.....	8
S. Rept. No. 1837, 82d Cong., 2d Sess., p. 2.....	8
S. Rept. No. 643, 83d Cong., 1st Sess.....	9
Webster's New International Dictionary, Second Edition (1952), Unabridged.....	6

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13351

FERRO-CO CORPORATION, PETITIONER

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE TAX COURT OF
THE UNITED STATES

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

On July 22, 1946, petitioner petitioned the Tax Court of the United States for a redetermination of excessive profits unilaterally determined by the War Contracts Price Adjustment Board to have been received by petitioner for the fiscal year ending December 31, 1944. The petition filed in the Tax Court named the WCPAB as respondent. While the petition was pending in the Tax Court, Congress, by section 201 (a) of the Renegotiation Act of 1951,¹ abolished the WCPAB. Section 201 (h) of the Renegotiation Act of 1951 (*infra*, p. 3), originally provided that "* * * any court having on its docket a case to which the War Contract Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section [May 22, 1951], showing a necessity for the survival of the suit, action, or other proceeding to obtain a determination of

¹ 65 Stat. 7, as amended, 50 U. S. C. App. 1231 (a) (*infra*, p. 3).

the question involved, may allow the same to be maintained by or against the United States."

The time for filing a motion or supplemental petition under section 201 (h) showing the necessity for the survival of a suit, action or other proceeding to which the WCPAB was a party, was extended an additional twelve months by section 3, Public Law No. 576, 66 Stat. 753 (*infra*, p. 4). On September 1, 1954, Congress further amended section 201 (h) so as to extend the time for filing a survival motion or petition until May 22, 1955. Section 8, Public Law No. 764, 68 Stat. 1118 (*infra*, p. 4).

Petitioner failed to file in the Tax Court the motion or supplemental petition prescribed by section 201 (h), as amended, by May 22, 1955. On September 16, 1955, the United States, appearing specially (Pet. App. 9, 16), moved that petitioner's petition for redetermination, filed July 22, 1946, be dismissed for failure to comply with section 201 (h) of the Renegotiation Act of 1951, as amended, 50 U. S. C. App. 1231 (h) (Pet. App. 9-11). On November 2, 1955, petitioner filed a cross-motion to substitute, *nunc pro tunc*, the United States as a party respondent in the Tax Court proceeding (Pet. App. 12-15).

On November 15, 1955, the Tax Court granted the Government's motion to dismiss and denied the cross-motion to substitute the United States as respondent (Pet. App. 16-17). Noting petitioner's failure to file timely the supplemental petition or motion required by section 201 (h), the court, in dismissing the petition, adhered to its decision in *C. H. Trace v. War Contracts Price Adjustment Board*, 21 T. C. 303 (App., *infra*, pp. 13-19) where petitions for redeterminations of excessive profits were dismissed for failure to comply with the survival requirements of section 201 (h) as amended in 1952.²

² While petitions for review of the *Trace* decision were pending in this Court, Congress enacted the 1954 amendment of section 201 (h) (*infra*, p. 4), which not only extended the time for filing a survival petition or motion to four years, but revived and reinstated any action which had been dismissed for failure to substitute the United States as respondent for the WCPAB. Following this amendment the petitions for review were dismissed by agreement of the parties. *C. H. Trace v. War Contracts Price Adjustment Board*, Nos. 12175, 12176, 12177 (C. A. D. C.)

In the *Trace* case, the Tax Court looked to the terms of section 201 (h) of the Renegotiation Act of 1951 and to its history. Unlike section 9 of the Reorganization Act of 1949,² considered by this Court in *Chairman of U. S. Maritime Com'n. v. California East L.*, 92 App. D. C. 207, 204 F. 2d 398, section 201 (h), and its history, the court held, leave "no doubt that Congress intended the term 'court' as used in section 201 (h) to mean the Tax Court of the United States and that for the purposes under consideration the rules of abatement should apply to this Court" (App., *infra*, p. 19).

STATUTES INVOLVED

Section 201 of the Renegotiation Act of 1951, 65 Stat. 7, 23-24, provides, in pertinent part, as follows:

(a) ABOLITION OF WAR CONTRACTS PRICE ADJUSTMENT BOARD.—The War Contracts Price Adjustment Board, created by the Renegotiation Act, is hereby abolished.

(h) SAVINGS PROVISION.—This section shall not be construed (1) to prohibit disbursements authorized by the War Contracts Price Adjustment Board and certified pursuant to its authority prior to the effective date of this section, (2) to affect the validity or finality of any agreement or order made or issued pursuant to law by the War Contracts Price Adjustment Board or pursuant to delegations of authority from it, or (3) to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may

² 63 Stat. 206, 5 U. S. C. 1332-7 (b).

allow the same to be maintained by or against the United States.

* * * * *

Section 3, Public Law No. 576, 82d Cong., 2d Sess., approved July 17, 1952, 66 Stat. 752-753, provides as follows:

* * * * *

Section 201 (h) of the Renegotiation Act of 1951 is amended by striking out "twelve months" and inserting in lieu thereof "two years".

Section 8, Public Law No. 764, 83d Cong., 2d Sess., approved September 1, 1954, 68 Stat. 1116, 1118, provides as follows:

* * * * *

Section 201 (h) of such Act is hereby amended by striking out "two years" and inserting in lieu thereof "four years", and by adding at the end thereof the following new sentence: "If any such case has been dismissed by any court for failure to substitute for the War Contracts Price Adjustment Board prior to the effective date of this sentence, such case is hereby revived and reinstated in such court as if it had not been dismissed."

SUMMARY OF ARGUMENT

1. By section 201 (h) of the Renegotiation Act of 1951, as amended, Congress allowed four years in which the United States, on motion or supplemental petition, could be substituted for the War Contracts Price Adjustment Board, abolished by section 201 (a) of the 1951 Act. Petitioner failed timely to move to substitute the United States as a party to its petition for redetermination pending in the Tax Court. The petition was, therefore, on this ground, properly dismissed by the Tax Court for lack of jurisdiction.

The applicability of the survival requirements of section 201 (h) to proceedings in the Tax Court to which WCPAB is a party, follows from the statutory language and is unequivocally confirmed by the legislative history of section 201 (h) and subsequent amendments. This history discloses that Congress intended and understood that the requirements of section

201 (h), upon the abolishment of WCPAB, were applicable to the Tax Court as well as other courts of the United States.

2. Petitioner's motion to substitute the United States as a party respondent for the WCPAB came more than five months after the expiration of the four-year period allowed for filing such a motion. There plainly is no merit, therefore, to petitioner's argument that the requirements of section 201 (h) have been satisfied in this case.

ARGUMENT

I

The Tax Court correctly dismissed the petition because of petitioner's failure to comply with the requirements of Section 201 (h) of the Renegotiation Act of 1951

Introduction

This Court, in *Chairman of U. S. Maritime Commission v. California Eastern Line*, 92 App. D. C. 207, 204 F. 2d 398,* held that a renegotiation proceeding in the Tax Court did not abate with the abolishment of the Office of Chairman of the United States Maritime Commission or upon the failure of the petitioner in that case to file timely with the Tax Court a motion or supplemental petition requesting that the action survive against the Secretary of Commerce. Under consideration in that case were the abatement, survival and substitution provisions of section 9 of the Reorganization Act of 1949, 5 U. S. C. 133z-7 (b) which, it was decided, did not apply to a proceeding for redetermination of excessive profits in the Tax Court. In so holding, the Court acknowledged that, when required by legislation or administrative rule, the doctrines of abatement and substitution, applicable to judicial proceedings, will apply to Tax Court proceedings. 204 F. 2d at 401.

This is such a case. The language of section 201 (h) of the Renegotiation Act of 1951 (*supra*, p. 3), as amended (*supra*, p. 4), and the legislative history leave no doubt that with the abolishment of the WCPAB Congress intended that a petitioner

*For the subsequent history of this case, *sub. nom. United States v. California Eastern Line*, see, 93 App. D. C. 289, 211 F. 2d 635, reversed, 348 U. S. 351, on remand, — App. D. C. —, 231 F. 2d 754, certiorari denied, 352 U. S. 848.

in redetermination proceedings in the Tax Court, file, within four years, a motion or supplemental petition showing the necessity for the survival of the proceeding against the United States. Petitioner failed to comply with the statutory requirements. The Tax Court, therefore, correctly dismissed the petition in this case. *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631; *Snyder v. Buck*, 340 U. S. 15; *Gaynor v. Metals Reserve Co.*, 174 F. 2d 286 (C. A. 8), certiorari denied, 338 U. S. 909.

A. The requirements of Section 201 (h) apply to proceedings for redetermination of excessive profits in the Tax Court

By section 201 (a) of the Renegotiation Act of 1951, 50 U. S. C. App. 1231 (a) (*supra*, p. 3), Congress abolished the WCPAB and transferred its "powers, functions, and duties" to the newly created Renegotiation Board (50 U. S. C. App. 1216, 1231 (b)) or to the Administrator of General Services (50 U. S. C. App. 1231 (d)). Section 201 (h) of the 1951 Act (*supra*, p. 3), contains a savings provision, in pertinent part, stating as follows:

This section shall not be construed * * * to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section, showing a necessity for survival of such suit, action or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States.

In contrast to 5 U. S. C. 133z-7 (b), considered by this Court in *Chairman of U. S. Maritime Commission v. California Eastern Line*, 92 App. D. C. 207, 204 F. 2d 398, the word "court" in section 201 (h) is preceded by the adjective "any"—meaning "* * * one * * * indiscriminately of whatever kind * * *." ⁵ Looking to the language of section 201 (h), it

⁵ Webster's New International Dictionary, Second Edition (1952), Unabridged.

is clear, therefore, that the statute here involved affords no basis for distinguishing the Tax Court from other courts of the United States.⁶

And the view that the words "any court," as used in section 201 (h), include the Tax Court, derives force from the fact that by section 403 (e) (1) of the Renegotiation Act of 1943 (50 U. S. C. App. 1191 (e) (1)), Congress made the Tax Court the exclusive forum for redetermining a contractor's excessive profits. Jurisdictional and constitutional questions excepted,⁷ the Tax Court's decision is final and not reviewable by any court or agency. In consequence of section 403 (e) (1), the great mass of renegotiation litigation to which the WCPAB has been a party has been in the Tax Court. Where Congress has made the Tax Court the dominant forum in renegotiation matters and where, at the time the 1951 Renegotiation Act was under Congressional consideration, the WCPAB was a party to no litigation other than in the Tax Court or on appeal from Tax Court decisions, (App., *infra*, pp. 20-21⁸), Congress undoubtedly intended that the survival requirements of section 201 (h) apply to Tax Court proceedings to which the WCPAB was a

⁶ On November 15, 1952, the Rules of Practice of the Tax Court were amended to conform to the provisions of section 201 (h). See Rule 64, Rules of Practice Before the Tax Court of the United States (26 U. S. C. A., following 7453).

⁷ *United States v. California Eastern Line*, 348 U. S. 351.

⁸ The affidavits of the General Counsel for the War Contracts Price Adjustment Board and the General Counsel of the Renegotiation Board (App., *infra*, pp. 20-21) state that the WCPAB was a party to no litigation other than in the Tax Court or on appeal from Tax Court decisions while the Renegotiation Act of 1951 was under Congressional consideration. These affidavits were filed in the Tax Court in connection with the motion to dismiss the petitions for redetermination in *C. H. Trace v. War Contracts Price Adjustment Board* (Tax Court Docket Nos. 406-R, 547-R, 748-R (App., *infra*, pp. 13-19)).

Further, when renegotiation legislation was first under consideration following the onset of the Korean War (H. R. 9246, 81st Cong., 2d Sess.), the Committee on Ways and Means of the House of Representatives was specifically advised by the Department of Justice that the only unsettled renegotiation litigation emanating from World War II was confined to "about 300 cases" in the Tax Court of the United States. Hearings before the Committee on Ways and Means on H. R. 9246, House of Representatives, 81st Cong., 2d Sess., p. 244-245. The hearings on H. R. 9246 served as a basis for Committee action on H. R. 1724 (the Renegotiation Act of 1951) in the 82d Cong., 1st Sess. See H. Rept. No. 7, 82d Cong., 1st Sess., p. 1.

party. To hold otherwise implies that "Congress intended a gesture of futility when it stated a [four-year] period for substitution." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631 at 636.

B. The legislative history of section 201 (h), as amended, confirms that the survival requirements of section 201 (h) apply to redetermination proceedings in the Tax Court

The history of section 201 (h) of the Renegotiation Act of 1951, as amended, removes all doubt that section 201 (h) applies to redetermination proceedings in the Tax Court.⁹

The original one year limitation for filing a motion or supplementary petition showing the necessity for the survival against the United States of a proceeding to which the WCPAB was a party, was enlarged to two years by section 3 of Public Law 576 (*supra*, p. 4). The report of the Senate Committee on Finance, where the enlargement originated as a Committee amendment to H. R. 5734, reads as follows:¹⁰

Your committee's second amendment extends for an additional year the time during which a litigant may substitute a new defendant for the War Contracts Price Adjustment Board in suits with respect to renegotiated contracts. Section 201 (h) of the Renegotiation Act of 1951 permitted such a substitution within 12 months after its effective date. *It is the understanding of your committee that in a large number of suits pending in the Tax Court no motion for substitution was made within this 12-month period, and that these suits will be dismissed without consideration of their merits unless the time for filing motions for substitution is extended.*¹¹

⁹ The reports of the House Committee on Ways and Means and the Senate Committee on Finance on H. R. 1724, which became the Renegotiation Act of 1951, state as follows with respect to § 201 (h): "Subsection (h) contains a savings provision to provide against the impairment of regulations or orders issued by the War Contracts Price Adjustment Board, and to protect against the lapse of litigation conducted in its name." H. Rept. No. 7, 82d Cong., 1st Sess., p. 14; S. Rept. No. 92, 82d Cong., 1st Sess., p. 22.

¹⁰ S. Rept. No. 1837, 82d Cong., 2d Sess., p. 2.

¹¹ Emphasis throughout the brief has been supplied.

On the floor of the Senate, Senator George explained the amendment of section 201 (h) in the following terms (98 Cong. Rec. 9079):

* * * That section merely gives an additional period of twelve months for the substitution of the proper party in proceedings before the courts, *including the Tax Court*, in connection with renegotiation proceedings under the World War II Renegotiation law. It is necessary to substitute a new party because the old renegotiation board has been abolished.

H. R. 5734, as amended in Committee, passed the Senate (98 Cong. Rec. 9079) without objection. The House concurred in the Senate amendment to section 201 (h) (98 Cong. Rec. 9449) which was explained on the floor of the House as follows (*ibid.*):

The second Senate amendment extends for 1 year the period of time in which the United States may be substituted for the old War Contracts Price Adjustment Board as a party in court proceedings in connection with renegotiation cases arising under World War II renegotiation law. This board has been abolished and it was necessary to make such a substitution.

In the 83d Congress, 1st Session, the House of Representatives passed H. R. 6287 extending and amending the Renegotiation Act of 1951 (99 Cong. Rec. 9523). As it passed the House, H. R. 6287 extended the time limitation in section 201 (h) from two years to three years. This amendment was explained on the floor of the House as follows:

*The committee amendment * * * extends for 1 year the time in which the United States can be substituted for the World War II War Contracts Price Adjustment Board in suits before the Tax Court. If the extension is not granted, a number of suits now pending in that court will be subject to dismissal on a technicality rather than on the merits.*

H. R. 6287 was favorably reported by the Senate Finance Committee. S. Rept. No. 643, 83d Cong., 1st Sess. The Senate report, with respect to the further amendment of section 201 (h), states (*ibid.*, p. 4):

*The bill in section 6 extends for 1 additional year the time in which the United States can be substituted for the World War II Contract Price Adjustment Board in suits before the Tax Court. If this extension is not granted, a number of suits now pending in that court will be subject to dismissal on a technicality rather than on the merits. Under existing law the substitution was required to be made within 2 years after March 23, 1951 [sic, May 22, 1951], the effective date of the Renegotiation Act of 1951.*¹²

Additional amendments to H. R. 6287 were reported by the Senate Committee on Finance on May 19, 1954. Among these amendments (100 Cong. Rec. 14771), placed before the Senate on August 17, 1954, was a further amendment to section 201 (h) which enlarged from two to four years the time for filing the motion or supplemental petition prescribed by section 201 (h). In addition, the proposed Committee amendment to section 201 (h) provided that:

If any such case has been dismissed by any court for failure to substitute for the War Contracts Price Adjustment Board prior to the effective date of this sentence, such case is hereby revived and reinstated in such court as if it had not been dismissed.¹³

Senator Millikin's explanation of the proposed amendments to section 201 (h), as related on the floor of the Senate, was as follows (100 Cong. Rec. 14772):

Section 8 extends until March 23, 1955 [sic, May 22, 1955] the time within which the United States can be substituted for the War Contracts Price Adjustment Board in suits before the Tax Court. It further provides that if such case has been dismissed by any court for

¹² A like explanation of H. R. 6287 was given on the floor of the Senate by Senator Millikin, Chairman of the Senate Finance Committee (99 Cong. Rec. 10537).

¹³ While H. R. 6287 was under consideration in the Senate, a number of petitions for redetermination were dismissed by the Tax Court for failure to file timely the motion or supplemental petition required by section 201 (h). See, e. g., *Trace v. War Contracts Price Adjustment Board*, 21 T. C. 303 (App., *infra*, pp. 13-19).

failure to substitute the War Contracts Price Adjustment Board prior to the effective date of this sentence, such case is hereby revived and reinstated in such court as if it had not been dismissed.

H. R. 6287, as amended, passed the Senate on August 17, 1954 (100 Cong. Rec. 14776). The Senate amendments to section 201 (h) were explained by Congressmen Reed and Jenkins on the floor of the House (100 Cong. Rec. 15215) in terms similar to the explanation given by Senator Millikin on the floor of the Senate. The House concurred in the Senate amendments without objection (100 Cong. Rec. 15216), and these amendments presently appear in the amended version of section 201 (h), 50 U. S. C. App. 1231 (h).

This history of section 201 (h) shows conclusively that the survival requirements of section 201 (h) were intended and understood by Congress to be applicable to Tax Court proceedings. A generous four years were allowed by the Congress to file the required survival motion or supplemental petition in the Tax Court. Petitioner's failure to comply with the statute within the time prescribed can be explained only in terms of a complete lack of diligence extending over a four-year period. Clearly, in these circumstances, there is small room for petitioner now to complain of the Tax Court's dismissal of its petition.¹⁴

II

Petitioner failed to file timely a motion or supplemental petition showing the necessity for the survival of the Tax Court proceeding for redetermination

Petitioner's motion to substitute the United States as a party to the Tax Court proceeding (Pet. App. pp. 12-15) was not filed until November 2, 1955, more than five months after the expiration of the four-year period allowed by section 201 (h) for the filing of such a motion. There is, therefore, plainly no merit to petitioner's argument (Pet. Br. pp. 10-13) that the requirements of section 201 (h) have somehow been satisfied in

¹⁴ The Renegotiation Act of 1951 was substantially amended by the Renegotiation Amendments Act of 1956, 70 Stat. 786, but without further amendment of section 201 (h).

this case. *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631, 636.

The only appearance of the United States in the Tax Court was a special appearance exclusively for the purpose of filing the motion to dismiss which led to the dismissal of the proceeding by the Tax Court (Pet. App. pp. 9, 16). The prior motion to dismiss the petition for redetermination for failure to prosecute was filed on behalf of the WCPAB on October 3, 1952 (Pet. App. p. 1). At the time this motion was filed and heard by the Tax Court, petitioner, under the 1952 amendment to section 201 (h), still had more than seven months in which to file the survival motion or supplemental petition. Thus, at the time of the motion to dismiss for failure to prosecute, in accordance with the command of section 201 (h), the Tax Court proceeding had not abated but, instead, the Tax Court continued to have jurisdiction of the proceeding with the WCPAB, although no longer in operation, still the party respondent. *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631, 636-637.

Neither the 1952 motion, nor the hearing thereon, afford any basis in fact for petitioner's assertion that in consequence of the motion the United States thereby "substituted itself" (Pet. Br. p. 10 ff) as a party respondent to the proceeding. Clearly, petitioner's present attempt to attach an unintended significance to the 1952 motion to dismiss comes as an afterthought and cannot avail to rescue it from the consequences of its prior lack of diligence.

CONCLUSION

For the foregoing reasons, we respectfully submit that the order of the Tax Court should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER,
JOHN G. LAUGHLIN,
Attorneys,
Department of Justice.

APPENDIX A

THE TAX COURT OF THE UNITED STATES

C. H. TRACE, PETITIONER

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, RESPONDENT

Docket Nos. 406-R, 547-R, 748-R. Promulgated November
27, 1953

Pursuant to the provisions of section 403 (e) (1) of the Renegotiation Act of 1943 the petitioner filed petitions with this Court contesting certain unilateral orders of the War Contracts Price Adjustment Board. While the matters raised by these petitions were still pending in this Court Congress enacted the Renegotiation Act of 1951 which abolished the War Contracts Price Adjustment Board and provided in section 201 (h) of that Act that the United States might be substituted as respondent for the War Contracts Price Adjustment Board upon motion or supplemental petition filed with this Court within 12 months of the effective date thereof, or to May 22, 1952. By supplemental statute the time for filing a motion or supplemental petition for the substitution of parties was extended an additional 12 months or to May 22, 1953. The petitioner failed to file the required supplemental petitions or motions until September 21, 1953. Pursuant to the respondent's motion to dismiss for lack of jurisdiction, *held*, since the provisions of section 201 (h) of the Renegotiation Act of 1951 were not complied with by the petitioner, this Court is without jurisdiction to further consider the matters raised by the petitions.

C. H. Trace, pro se.

Harland F. Leathers, Esq., for the respondent.

OPINION

HILL, Judge: In docket Nos. 406-R, 547-R and 748-R the War Contracts Price Adjustment Board issued a unilateral order determining that the petitioner for his fiscal years ended December 31, 1943, December 31, 1944, and December 31, 1945, respectively, had realized excessive profits. The petitioner filed petitions with this Court for a redetermination of the issue. The authority under which the petitioner filed his petitions and by which this Court had jurisdiction thereof is section 403 (e) (1) of the Renegotiation Act of 1943, which provides in pertinent part as follows:

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.

* * *

In accordance with the then effective rules of this Court, the War Contracts Price Adjustment Board was named as the respondent. After the filing of the petitions mentioned above and while these actions were still pending in this Court, Congress enacted the Renegotiation Act of 1951, which pursuant to section 201 (k) was effective 60 days after the Act's approval,

or on May 22, 1951. Section 201 (a) of that Act abolished the War Contracts Price Adjustment Board, and section 201 (h) contained a savings clause which provides in pertinent part as follows:

(h) SAVINGS PROVISION.—This section shall not be construed * * * to prejudice or to abate any action taken or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause; but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States.

By supplemental statute (66 Stat. 752) Congress extended the time for filing a supplemental petition or motion for an additional 12 months, or to May 22, 1953. On November 15, 1952, the Rules of Practice of this Court were amended to conform to the provisions of section 201 (h). Rule 64, Rules of Practice Before The Tax Court of the United States.

No motion or supplemental petition seeking to substitute the United States as defendant in the causes involved herein were filed with this Court during the statutory period as set forth above. It was not until September 21, 1953, that the petitioner's motion herein was filed with this Court. On August 13, 1953, the respondent by motion moved this Court to dismiss the proceedings involved herein for lack of jurisdiction because the provisions of section 201 (h) of the Renegotiation Act of 1951 had not been complied with by the petitioner.

We must grant the respondent's motion to dismiss and deny the petitioner's motion to substitute the United States as respondent. Our reason for doing so is that the petitioner's failure to comply with the provisions of section 201 (h) has effected an abatement of the proceedings and deprives us of jurisdiction in the matters involved.

This Court is, of course, a court of limited jurisdiction, exercising only those powers granted to it by statute. If the

statutes upon which our jurisdiction rests are not complied with, we lose jurisdiction, e. g., *Hill Machine Co. v. Secretary of War*, 4 T. C. 922; *Iverson & Laux, Inc. v. Secretary of Navy*, 6 T. C. 247.

In reaching our conclusion we are not unmindful of the recent decision of the Court of Appeals for the District of Columbia Circuit in *Chairman of United States Maritime Commission v. California Eastern Line, Inc.*, 204 F. 2d 398. That case involved section 9 of the Reorganization Act of 1949, which provided:

No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of the taking effect of any reorganization plan under the provisions of sections 133z to 133z-15 of this title, but the court may, on motion or supplemental petition filed at any time within twelve months after such reorganization plan takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the successor of such head or officer under the reorganization effected by such plan or, if there be no such successor, against such agency or officer as the President shall designate.

Counsel for the respondent argued that since the petitioner in that case did not file a motion or supplemental petition with this Court within the 12 months' period following May 24, 1950, requesting that the action survive against the Secretary of Commerce, who was the successor to such Board, that the action abated and that this Court was without jurisdiction to render its decision. In denying the respondent's motion the Court of Appeals decided that the term "court" as used in section 9 of the Reorganization Act of 1949 was not meant to include The Tax Court of the United States and, further, that the common law rules of abatement did not apply to this Court, saying in part as follows:

In renegotiation proceedings before the Tax Court, the doctrines of abatement and substitution applicable

to judicial proceedings are not in our view required for the protection either of the citizen or of the Government. On the Government's side, it is the national treasury which, in any event, will ultimately gain or lose as against the citizen. And the hazard that the proper Government official may not be named as respondent under the rules of the Tax Court presents no serious difficulty. In the instant case, no affirmative relief was asked against the Chairman of the Maritime Commission in the Tax Court proceedings; the Tax Court was simply to review his order and redetermine the matters there involved. Abatement on the ground that the Chairman was no longer in office or his office no longer in existence would not bear any relation to the realities of the situation, and would defeat the ends of justice. We would not willingly reach that result unless required to do so by legislation or proper administrative rule. In the present case we find no such statutory or administrative requirement. Accordingly we deny the Government's motion to remand the cause to the Tax Court with directions to vacate its judgment.

Our inquiry must then be whether Congress when using the term "court" in section 201 (h) of the Renegotiation Act of 1951, as amended, intended The Tax Court of the United States. The legislative history of this section indicates that such was indeed the case. First, it must be realized that section 403 (c) (2) of the Renegotiation Act of 1943 provides that actions to *collect* renegotiation claims (the only de novo litigation relating to renegotiation conducted outside of this Court) shall be in the name of the United States. On the other hand section 403 (e) of the Renegotiation Act of 1943 specifically provided that actions to determine the amount of excessive profits received or accrued by a contractor or subcontractor should be heard in this Court against the War Contracts Price Adjustment Board or, pursuant to section 201 (h) of the Renegotiation Act of 1951, against the United States.

The legislative history of section 201 (h) indicates that the members of the Committee on Ways and Means specifically asked what litigation involving renegotiation was pending

and were advised of no litigation other than that in this Court. Hearings before the Ways and Means Committee, H. R. 9246, 81st Cong., 2d Sess., August 25, 1950. Congress therefore evidently intended the term "court" to mean The Tax Court of the United States. This is clearly demonstrated by the statement contained in Senate Report No. 1837 accompanying H. R. 5734, which became effective as 66 Stat. 752, 753, to the effect:

Your committee's second amendment extends for an additional year the time during which a litigant may substitute a new defendant for the War Contracts Price Adjustment Board in suits with respect to renegotiated contracts. Section 201 (h) of the Renegotiation Act of 1951 permitted such a substitution within 12 months after its effective date. It is the understanding of your committee that in a large number of suits pending in the Tax Court no motion for substitution was made within this 12-month period, and that those suits will be dismissed without consideration on their merits unless the time for filing motions for substitution is extended.

(U. S. Code Congressional and Administrative News, 1952, Vol. 2, pp. 2311, 2312.)

Again, on July 3, 1952, when the Renegotiation Act of 1951 was being discussed on the floor of the United States Senate, Senator George had this to say in explanation of section 201 (h):

That section merely gives an additional period of 12 months for the substitution of the proper party in proceedings before the courts, including the Tax Court in connection with renegotiation proceedings under World War II Renegotiation law. It is necessary to substitute a new party because the old Renegotiation Board has been abolished.

(Congressional Record, Vol. 98, p. 9078.)

Further, on July 29, 1953, when Congress was again considering extending the time in which the provisions of section 201 (h) could be complied with, the following was said by Senator Milliken in explanation of the purpose of the section under consideration:

The Bill in Section 6 extends for one additional year the time in which the United States can be substituted for the World War II War Contracts Price Adjustment Board in suits before the Tax Court. If this extension is not granted, a number of suits now pending in that Court will be subject to dismissal on a technicality rather than on the merits. Under the existing law, the substitution was required to be made within two years after March 23, 1951 [sic May 22, 1951], the effective date of the Renegotiation Act of 1951.

(Congressional Record, Vol. 99, p. 10537.)

We, therefore, have no doubt that Congress intended the term "court" as used in section 201 (h) to mean The Tax Court of the United States and that for the purposes under consideration the rules of abatement should apply to this Court. As the result of these conclusions it follows that since the petitioner had not complied with the provisions of section 201 (h) as amended, this Court is without jurisdiction to further consider the matters raised by the petitions in question.

Reviewed by the Court.

An order will be entered granting the respondent's motion to dismiss the proceedings involved herein for lack of jurisdiction and denying the petitioner's motion for substitution of the United States as respondent.

APPENDIX B

AFFIDAVIT

UNITED STATES OF AMERICA,

District of Columbia, ss:

Philip Nichols, Jr., being duly sworn, deposes and says that:

1. He is now and has been the General Counsel of The Renegotiation Board since the organization of The Renegotiation Board under the Renegotiation Act of 1951.

2. As provided in Title II of the foregoing Act, the Renegotiation Board is the successor to the War Contracts Price Adjustment Board.

3. To the best of his knowledge and belief the War Contracts Price Adjustment Board during the pendency of the Renegotiation Act of 1951 before the Congress of the United States was not a party to any case or proceeding in any court except the Tax Court of the United States, or cases or proceedings on appeal from decisions of the Tax Court of the United States.

/s/ PHILIP NICHOLS, Jr.
Philip Nichols, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this the 25th day of June 1953.

/s/ PERLEY D. TILESTON,
Notary Public.

My Commission expires March 31, 1958.

AFFIDAVIT

UNITED STATES OF AMERICA,

District of Columbia, ss:

Charles C. Wise, Jr., being duly sworn, deposes and says that:

1. He was the General Counsel of the War Contracts Price Adjustment Board from April 1948 until that Board was abol-

ished by the Renegotiation Act of 1951 (50 U. S. C. A. App. § 1231).

2. As General Counsel of the War Contracts Price Adjustment Board all matters relating to litigation in any court wherein the War Contracts Price Adjustment Board was a party in the normal course came to his attention.

3. To the best of his knowledge and belief the War Contracts Price Adjustment Board during the pendency of the Renegotiation Act of 1951 before the Congress of the United States was not a party to any case or proceeding in any court except the Tax Court of the United States, or cases or proceedings on appeal from decisions of the Tax Court of the United States.

/s/ Charles C. Wise, Jr.

CHARLES C. WISE, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this the 26th day of June 1953.

/s/ GLADYS E. MCGAFFEY,

Notary Public.